92-1402

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a local law requiring disposal of all trash, regardless of origin, at a designated local facility, and prohibiting the export of such trash out of state, constitutes a burden on and a discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution.

LIST OF PARTIES

Petitioners

C & A Carbone, Inc.
Recycling Products of Rockland, Inc.
C & C Realty, Inc.
Angelo Carbone

Respondent in Interest

Town of Clarkstown, New York

Other Respondents

"John Doe 1 through 6"

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OPINIONS BELOW

The decision of the Supreme Court, Appellate Division, Second Department of the State of New York was rendered on August 31, 1992. That decision is reported at 182 A.D.2d 213 and 587 N.Y.S.2d 681 and is reproduced at pages 1a-15a of the appendix to this petition ("Pet. App."). The decision of the Court of Appeals of the State of New York denying petitioners' motion for leave

to appeal, rendered on October 27, 1992, is reported at 80 N.Y.2d 260 and 605 N.E.2d 874 and is reproduced at Pet. App. 47a.

The July 15, 1991 decision of the court of original jurisdiction, the Supreme Court of the State of New York, County of Rockland, is unreported and is reproduced at Pet. App. 22a-33a. The September 16, 1991 opinion of that court upon reargument is unreported and is reproduced at Pet. App. 16a-21a.

The July 11, 1991 decision of the United States District Court for the Southern District of New York in a related action between the parties is reported at 770 F. Supp. 848 and is reproduced at Pet. App. 34a-46a.[1]

JURISDICTION

The decision of the Supreme Court, Appellate Division, Second Department of the State of New York was issued on August 31, 1992. An order denying petitioners' timely motion for leave to appeal was issued by the Court of Appeals of the State of New York on October 27, 1992. The time within which to file this petition was extended to February 24, 1993 by order of Justice Thomas dated January 14, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

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[1] All parties to the proceeding below are identified in the list of parties, *supra*. "John Doe 1 through 6" were named defendants below, but to the best of petitioners' knowledge, do not refer to any real persons or entities. There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1 of this Court.

In accordance with Rule 29.4(c), petitioners note that this case could be viewed as drawing the constitutionality of a New York State statute into question and that 28 U.S.C. § 2403(b) may be applicable. The statute involved is enabling legislation, the Holland-Gromack Law, 1991 N.Y. Laws ch. 569, at 1687-89, which authorizes municipalities within Rockland County, N.Y., to adopt local flow control ordinances.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, sec. 8, cl. 3, provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

Local Laws, 1990, No. 9 of the Town of Clarkstown, New York ("Local Law 9"), is reproduced at Pet. App. 48a-54a. Most pertinent, Sections 3(C)-(D) and 5(A) provide that:

> Section 3. Collection and Disposal of Acceptable Waste
>
> • • • •
>
> C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code . . . . As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.
>
> D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.
>
> • • • •
>
> Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown
>
> A. It shall be unlawful, within the Town, to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pur-

suant to agreement with the Town of Clarkstown and recyclables . . . brought to Clarkstown recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

STATEMENT OF THE CASE

This case involves a challenge under the Commerce Clause to a local ordinance that prohibits the export of trash to points outside the town. Until issuance of the decision below, petitioners were in the business of receiving trash from customers in New Jersey and New York State, separating the trash into recyclable and non-recyclable parts, sending the recyclable parts to recycling processors and sending the non-recyclable parts out of state to landfills or to facilities that burn the waste to generate power. Pet. App. 35a. Petitioners shipped 150 tons of separated trash per week to Ohio, Delaware, Pennsylvania, Kentucky, Indiana, and Florida. Rec. 82. Petitioners' operation served essentially as a broker between sources of trash and facilities that can recycle, use, or dispose of the trash.

Petitioners have been enjoined from engaging in this business as the result of a state court action brought by the Town of Clarkstown, New York, in which petitioners' operation is located. Pet. App. 14a, 32a. The action was brought to enforce a local ordinance requiring that all acceptable waste—whether originating in the town, in other points in New York, or out of state—must be disposed of at the town's designated trash disposal facility or at an approved recycling center.[2] Pet. App. 24a-25a;

[2] "Acceptable" waste under Local Law 9 includes residential, commercial, and industrial solid waste, but does not include hazardous waste (i.e., waste designated as hazardous under various federal statutes), pathological waste (i.e., various types of medical waste and other types of infectious or biohazardous waste), and sludge (i.e., waste from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility). Local Law 9 § 1, Pet. App. 48a-49a.

Local Law 9, §§ 3(A) and 5(A), Pet. App. 51a, 53a. Ordinances of this type, requiring that certain types of waste in a locality must be brought to a designated facility and cannot be exported, are known as "flow control" ordinances. *See* Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219, 1230-31 (1992) (student note).

Local Law 9 permits approved recycling centers, such as petitioners' operation, to send recyclable materials out of town for processing.[3] Local Law 9 §§ 3(C) and 5(A), Pet. App. 51a, 53a. However, the ordinance requires such recycling centers to send the nonrecyclable parts of their trash to the town's designated trash disposal facility. *Id.* The ordinance thus prohibits the movement of the nonrecyclable trash from the recycling center to out-of-state destinations.

The town's designated trash disposal facility is operated by a private contractor, under an agreement with the town. Pet. App. 35a. The designated facility charges a tipping fee of $81 per ton to handle trash, substantially more than the $70 per ton tipping fee charged by petitioners. *Id.* Under its agreement with the town, the contractor is guaranteed a certain quantity of trash to process. *Id.* In return for this guarantee, the town has

[3] Petitioners' facility is an authorized recycling center. Pet. App. 6a.

The town sought in the courts below to characterize petitioners' facility as a "transfer station." Pet. App. 26a. Because petitioners' bypassing of the town-designated facility is prohibited by Local Law 9 whether their operation is characterized as a recycling center or a transfer station, the choice of labels is not directly material to this action. The town may have been attempting to establish a record that would enable it to close petitioners' facility pursuant to a local zoning ordinance, not challenged here, under which all transfer stations other than the town-designated transfer station are prohibited. In any event, the town's characterization was never adopted by the courts below.

the right to acquire the facility in five years for a price of one dollar. *Id.*

If the guaranteed quantity is not forthcoming, the town must pay the contractor the difference in lost revenue. *Id.* Local Law 9 was enacted to reduce the possibility that the town would have to pay under the guarantee. Pet. App. 35a, 43a.

The town sued petitioners in the Supreme Court of Rockland County on March 18, 1991, seeking an injunction to compel them to cease disposing of their non-recyclable trash at any site other than the designated facility. Pet. App. 36a. In the First Amended Answer to the First Amended Complaint, petitioners asserted a defense based on the invalidity of Local Law 9 under the Commerce Clause. Pet. App. 55a, Rec. 407. Petitioners also asserted defenses at that time under the Due Process Clause and state law.

On March 27, 1991, while the state court action was pending, petitioners instituted a federal court action in the Southern District of New York. *C & A Carbone, Inc. v. The Town of Clarkstown and Clarkstown Recycling Center*, No. 91 Civ. 2105 (CLB), S.D.N.Y. On July 11, 1991, the federal court (Brieant, C.J.) granted a preliminary injunction against the enforcement of Local Law 9 with respect to trash originating outside the town. Pet. App. 45a. That court held it "likely" that petitioners could demonstrate the law to be an impermissible burden on interstate commerce:

> Although ostensibly Local Law No. 9 was promulgated to protect the health and environment of the residents of Clarkstown from the hazards associated with dumping solid wastes in landfills, the Town cannot legislatively slow down or prohibit the flow of commerce, in this case, interstate solid waste products, by artificially inflating the price of processing solid waste generated without the Town from

> $70/ton to $81/ton and thereby augment the economic security of the Town.
>
> It does not seem likely that the Town's interest in meeting its tonnage requirements to defendant Clarkstown Recycling Center, Inc. and in so doing avoid a penalty for each ton under the requisite annual minimum of 120,000 tons . . . can constitutionally justify the requirement that solid waste processors and carters expend the sum of $81/ton, rather than the $70/ton they paid prior to the enactment of Local Law No. 9, to process and cart the same without of Town solid waste to the same without of Town facilities. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) . . . .

Pet. App. 43a.

The federal district court's preliminary injunction was dissolved after the Supreme Court of Rockland County issued a decision holding Local Law 9 to be constitutional, granting summary judgment to the town, and issuing an injunction against petitioners. Pet. App. 32a. Relying on the Third Circuit's decision in *J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988), the state court held that Local Law 9 did not violate the Commerce Clause because it treated trash originating out-of-state the same as trash originating in-state. Pet. App. 29a-31a. Wholly ignoring the export restriction, the court concluded that "defendants have failed to demonstrate that Local Law #9 has any 'demonstrable effect whatsoever on the interstate flow of goods.'" *Id.* at 30a. The court also rejected petitioners' due process and state law claims.

On reargument, the state trial court again held for the town. Pet. App. 17a. With respect to the Commerce Clause the trial court, applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1979), indicated that petitioners had not provided sufficient informa-

tion concerning "the nature of their alleged interstate commerce activities" and that the law had therefore not been shown to be invalid. Pet. App. 18a. It was uncontroverted that the law was being enforced with respect to shipments of trash that included trash originating out of state, but the court considered that to be an insufficient showing. Pet. App. 19a, 26a. The state court again made no mention of the fact that Petitioners shipped *all* of their trash *to* out-of-state facilities after separation.

Petitioners appealed to the Appellate Division, Second Department, which affirmed the trial court's decision. Pet. App. 14a. Like the trial court, the Appellate Division did not address the impact of the ordinance on the export of trash. The Appellate Division held Local Law 9 to be valid under the Commerce Clause because it "applies evenhandedly to all solid waste processed within the Town, regardless of point of origin," Pet. App. 11a. It also concluded that the $11 per ton differential in processing charges, if it had "any effect on the interstate flow of solid waste," was permissible in light of "the legitimate and significant public concerns underlying the local law. . . ." Pet. App. 12a. The Appellate Division took note of the contrary views expressed by the federal court, but stated that the federal decision "does not require that we rule in [petitioners'] favor here." *Id.* The New York Court of Appeals denied petitioners' motion for leave to appeal. Pet. App. 47a.

REASONS FOR GRANTING THE WRIT

This case involves an issue that has divided the lower courts—the validity, under the Commerce Clause, of a flow control law that prohibits the disposal of trash at any point other than a "designated facility" within the locality. Generally enacted by local jurisdictions that have a financial stake in the designated facility, such ordinances restrict the export of trash to locations out of state that may be able to use the trash or accomplish disposal at a lower cost.

An estimated 15 million tons of solid waste, not including hazardous waste, moves in interstate commerce each year. *See Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 263 (1991) (hereinafter "*1991 House Hearings*") (statement of Allen Moore, President, National Solid Wastes Management Association). This Court long ago ruled that trash is entitled to the protection of the Commerce Clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Last Term, it confirmed that state or local laws that prohibit or discriminate against the import of trash originating out of state or outside the locality violate the Commerce Clause unless shown to be justified by legitimate local concerns that cannot adequately be met by nondiscriminatory alternatives. *See Fort Gratiot Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992). The constitutional implication of laws restricting the export of trash to other states has now become equally important, and guidance from the Court is urgently needed.

I. THE VALIDITY OF FLOW CONTROL LAWS IS A MATTER OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

In recent years, an increasing number of localities have adopted flow control laws such as Local Law 9 as a means of financing waste disposal projects. At least twenty-six states now expressly grant localities or state agencies the authority to adopt flow control regulations.[4]

Unlike the laws considered by this Court in *Chemical Waste Management*, *supra*; *Fort Gratiot Landfill*, *supra*; and *City of Philadelphia*, *supra*, which sought to prohibit or burden the importation of waste into a state or municipality, flow control laws seek to prohibit or burden the export of waste out of the state or municipality. As explained *infra* at pp. 18-22, these laws have spawned extensive Commerce Clause litigation in the federal and state courts, with those courts reaching divergent results.

The problem that has led to protectionist legislation here, and in other localities that have similar laws, is the mirror image of the "not-in-my-back-yard" syndrome that

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[4] Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit. 7, § 6406(31)); Florida (Fla. Stat. § 403.713); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. ch. 34, para. 5-1047); Indiana (Ind. Code §§ 36-9-31-3 & -4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307(9)); Maine (Me. Rev. Stat. tit. 38, § 1304-B(2)); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws ch. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code, § 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01 (H)(2)); Oregon (Or. Rev. Stat. § 268.317(3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen. Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code § 36.58.040, 35.21.120); West Virginia (W. Va. Code § 240-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)).

led to the earlier restrictions on importing waste. Flow control laws instead represent an effort to shift the costs of waste disposal facilities for which a locality has contracted.

As the U.S. Environmental Protection Agency has noted, one of the "major factors" affecting the financial risk of a waste disposal project—such as a landfill, a waste-to-energy plant, or a recycling plant—is the availability of a steady supply of waste. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action (Background Document)* 3.B-2 (Sept. 1988) (hereinafter "*The Solid Waste Dilemma*"). Flow control ordinances are a convenient means of insuring the supply of waste to a facility. *See id.* at 3-C.3; Kelly Outten, *Waste To Energy: Environmental and Local Government Concerns*, 19 U. Rich. L. Rev. 373, 392 (1985) (student note).

The political attraction of flow control laws is apparent. By forcing all waste that makes its way into the local jurisdiction to go to the designated local disposal facility, possibly at an inflated cost, the locality can shift some of the cost of operating the facility away from its own citizens. These costs have increased significantly, and will continue to increase, as a result of stricter environmental safeguards imposed on the construction and operation of the facilities, as well as other cost trends. *See* Outten, *supra*, at 375; *1991 House Hearings* at 317-18 (statement of Richard F. Goodstein, Divisional Vice President, National Government Affairs, Browning-Ferris Industries). In shifting these costs, however, flow control laws impose a burden on the citizens of other areas, who also have to deal with waste disposal problems—and who will inevitably be tempted to enact a similar law for their own benefit. This kind of Balkanization, in which states or localities seek to advance their own interests by erecting barriers to the free movement of waste, is precisely what the Commerce Clause was intended to prevent.

The impact of such laws on waste handlers such as petitioners, who seek to handle waste moving in interstate commerce, is also apparent.[5] By prohibiting such businesses from sending waste directly to out-of-state landfills or users of the waste, flow control laws force such companies to subsidize the designated facilities rather than selecting a more competitive facility in the interstate market. The burden is particularly heavy where, as here, the tipping fee charged by the designated facility is significantly above the competitive rate.

Moreover, the effects of a state or local ban on the export of trash extend beyond the solid waste industry. For example, by limiting the source availability of trash or artificially raising its price, such laws obstruct the use of solid waste as a source of energy. In this case, petitioners sent substantial volumes of nonrecyclable waste to "resource recovery centers," which burn trash to generate electricity. Rec. 332. Such movements are precluded under Local Law 9.[6]

Flow control laws also have a major impact on the interstate motor carriers and railroads that haul solid waste from one state to another. The impact is illustrated by this case, in which the town detained out-of-state trucks and confiscated their loads. Rec. 83-87, 111, 112. Motor carriers and railroads can hardly be expected to be familiar with the local economic ordinances of every town or county where they transport waste. Yet flow control laws subject them to the risk of disruption of

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[5] Indeed, most of the cases that have arisen challenging flow control laws, discussed *infra* at pp. 18-22, were initiated by one or more privately-owned waste facilities whose interstate business was directly affected by the law.

[6] In addition, as the U.S. Environmental Protection Agency has found, flow control laws have restricted the recovery of paper for recycling. *See The Solid Waste Dilemma, supra*, at 3.D-6.

their interstate operations and loss of revenue if they unknowingly handle a shipment not destined for a designated facility.

Finally, the constitutionality of flow control laws is of obvious importance to the states and localities that have enacted, or are considering the enactment of, such laws. Financial obligations are being incurred by towns and counties across the country on the assumption that they will be able to prevent the export of trash, thus insuring a captive supply of waste and monopoly prices for the designated facility. *See* C. Baird Brown, *Solid Waste Contracts, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 213, 227 (1988).

If, as we believe, such flow control laws violate the Commerce Clause, these local governmental units need to know this now, so that their solid waste management decisions can be made on a fully informed basis.[7] On the other hand, if flow control laws are found not to violate the Commerce Clause, then the localities will benefit from a decision of this Court that dispels the existing cloud

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[7] For much the same reasons, the bondholders and contractors who finance the construction and operation of waste facilities need certainty as to whether flow control laws are enforceable. Although these financing arrangements are typically backed by "use or pay" contracts such as the one entered into by the town of Clarkstown here, the validity of flow control laws still has practical consequences for these parties. As one commentator has explained, if the flow of waste is inadequate, thereby forcing the locality to make good on its minimum tonnage guarantee, "that community will be looking for every way it can to get out of its contract. So the underwriters are going to want to be able to tell the bondholders that there's lots of waste and that it's all coming to the project." C. Baird Brown, *A Checklist For Legally Enforceable Obligations To Use Disposal Services*, in ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 325 (1988).

that has resulted from the disarray of the lower courts, discussed in Part III of this petition.

II. FLOW CONTROL LAWS SUCH AS LOCAL LAW 9 BURDEN AND DISCRIMINATE AGAINST INTERSTATE COMMERCE

Only last term, this Court in *Fort Gratiot* reiterated that "the Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, *either into or out of the state*.'" 112 S. Ct. at 2019 (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949)) (emphasis added). Such a statute is unconstitutional unless it "is demonstrably justified by a valid factor unrelated to economic protectionism," *Id.* at 2024 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)), which "cannot be adequately served by nondiscriminatory alternatives," *Id.* at 2027.

In upholding Local Law 9, the court below simply ignored its effect on the movement of trash *out* of the town. Rather, the lower court focused solely on the incoming side of the equation and concluded that, because the export restriction "applies evenhandedly to all solid waste processed within the town, regardless of point of origin," Pet. App. 11a, there could be no burden on interstate commerce. This analysis misses the point. It is the export restriction itself—not the origin of the trash to which it applies—that creates a burden on and a discrimination against interstate commerce. This issue was not even addressed by the court below.

When subjected to a proper analysis, it is apparent that Local Law 9 cannot pass constitutional muster. Under its terms, anyone with nonrecyclable waste—whether originating in the town, in other points in New York, or in other states—must dispose of it at the local, town-authorized disposal facility, and cannot do business

with other facilities located outside the town or outside the state. A clearer example of a law that "curtail[s] the movement" of goods "out of the state" (*H.P. Hood*, 336 U.S. at 535) is difficult to imagine.

Indeed, the uncontroverted facts demonstrate that such a curtailment has in fact resulted from the ordinance. Before the enforcement of Local Law 9 against petitioners, their facility was sending nonrecyclable material directly to landfills and power generating plants in Ohio, Delaware, Pennsylvania, Kentucky, Indiana and Florida. Pet. App. 26a. Local Law 9, on its face and as applied in this case, thus burdens and discriminates against interstate commerce, sheltering the in-state interest—the designated disposal facility—from out-of-state competition. Given this fact, Local Law 9 could be upheld only if it were shown to be "demonstrably justified by a valid factor unrelated to economic protectionism." *Fort Gratiot*, 112 S. Ct. at 2024 (citation omitted). No such showing has been—or could be—made.[8]

It is clear that the driving force behind Local Law 9, like that of other flow control laws, is economic. The injunction against petitioners' operations was not based on any health, safety, or aesthetic objections to petitioners' center—which indeed is licensed by the State. Pet. App. 3a. In enacting the enabling legislation that authorized the town to adopt Local Law 9, the state legislature stated that its purpose was "to make these facilities [with which the town contracted] technically and economically viable." Rec. 376.

The town's own evidence confirmed that Local Law 9 was enacted because the financial benefit conferred by it

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[8] The court below failed to analyze Local Law 9 under this criterion, applying instead the lenient standards applicable to a neutral regulation that imposes only an incidental burden on interstate commerce. Pet. App. 12a. This was clear error.

upon the operator of the designated trash disposal facility ultimately confers a financial benefit upon the town itself. As the town supervisor explained, a contractor constructed the designated facility for the town, which has the right to purchase the facility at the end of five years for $1. Pet. App. 35a. In return, the town was required to guarantee the operator of the designated facility at least 120,00 tons of trash per year, and must pay it a per-ton penalty if it fails to receive the guaranteed minimum. Operations such as petitioners', which bypass the designated facility, increase the likelihood that the guarantee might not be met—unless those operations are halted by an export ban. *See* Charles Holbrook Aff., Rec. 60.[9]

Thus, despite the reference of the Appellate Division to the safety and health aspects of solid waste disposal, Pet. App. 9a, it is clear that the purported safety and health benefits of Local Law 9 derive simply from "the continued economic viability" of the town's waste facility. Pet. App. 10a. In this respect, the situation here is the same as that before the Eighth Circuit in *Waste Systems Corp. v. Cty. of Martin*, No. 92-1642 (8th Cir. Feb. 18, 1993), where the court observed that although the construction of the disposal facility may have been prompted by "legitimate environmental concerns, the purpose behind the Ordinances is solely economic." Slip op. at 15.[10]

As with other flow control laws, the essential flaw of Local Law 9 is that it seeks to advance the economic interests of the town's own residents through restrictions

[9] The supervisor explained, "By unlawfully bypassing the TOWN's transfer station, defendants are costing the TOWN and its residents thousands of dollars daily in uncollected revenues as well as increasing the likelihood of TOWN's failure to meet its contractual obligation to the transfer station." Charles Holbrook Aff., Rec. 60.

[10] The *Waste Systems* decision is not yet reported. Copies of this and other unreported decisions cited in this Petition have been lodged with the Clerk of the Court.

on interstate commerce. As this Court has emphasized, while a locality "has every right to protect its residents' pocketbooks," it cannot do so "by the illegitimate means of isolating the [locality] from the national economy." *City of Philadelphia v. New Jersey*, 437 U.S. at 626-27; *accord*, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2012. This is precisely what Local Law 9 does. By attempting to insure its ability to meet the minimum tonnage guarantee through a ban on the export of trash by petitioners, the town has imposed a burden on interstate commerce that cannot withstand constitutional scrutiny.[11] The Eighth Circuit has accurately described similar ordinances as "economic protectionism, serving to protect in-state economic interests at the expense of out-of-state competitors." *Waste Systems*, slip op. at 14.

Moreover, even if a flow control law could somehow be shown to be something other than pure economic protectionism, given its " 'patent discrimination against interstate trade' " *Chemical Waste Management*, 112 S. Ct. at 2014 n.5 (citation omitted), it still must be invalidated unless it is shown that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *see also Fort Gratiot*, 112 S. Ct. at 2027. But, as an Alabama district court in *Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Authority*, Civ. No. 92-T-642-S, slip op. at 29 (M.D. Ala. Feb. 5, 1993) recently observed, there are numerous other means by which the financial viability of a waste disposal program can be assured, including competing with facilities such as petitioners' by charging competitive rates, or supplementing any shortfall through

[11] The fact that the ban on export applies to the movement of goods to other localities within the State of New York, as well as to movements out of state, does not save the ordinance from constitutional infirmity. *Fort Gratiot*, 112 S. Ct. at 2024-25; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

increases in local taxes or utility charges. Given these readily-available alternatives, a flat ban on the direct export of waste plainly constitutes a burden on and discrimination against interstate commerce forbidden by the Commerce Clause.

III. THE LOWER COURTS ARE IN DISARRAY AS TO WHETHER FLOW CONTROL LAWS VIOLATE THE COMMERCE CLAUSE

Four federal courts of appeals have now had occasion to address the issue of the constitutionality of flow control laws. Two of these courts—the Eighth Circuit and the First Circuit—have concluded that flow control laws violate the Commerce Clause. *Waste Systems Corp. v. Cty. of Martin*, No. 92-1642 (8th Cir. Feb. 18, 1993); *DeVito v. Rhode Island Solid Waste Management Corp.*, 947 F.2d 1004 (1st Cir. 1991) (granting preliminary injunction), *aff'g*, 770 F. Supp. 775 (D.R.I. 1991).[12] On the other hand, the Third Circuit and the Sixth Circuit, like the Appellate Division here, have upheld flow control laws against Commerce Clause challenge. *See J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envir. Prot.*, 857 F.2d 913 (3d Cir. 1988); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

This same split appears in the decisions of the federal district courts and state courts. Within the past year, two federal district courts have held flow control laws invalid under the Commerce Clause. *See Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority, supra; Container Corp. of Carolina v. Mecklenburg County*, No. 92 cv-154-MV (W.D.N.C. June 14, 1992) (granting preliminary injunction). Other courts, however, have found flow control laws permissible. *See In re Fiorillo Bros.*, 577 A.2d 1316, 242 N.J. Super. 667, *cert. denied*, 122 N.J. 363, 585 A.2d 371 (1990); *Harvey & Harvey, Inc. v. Del. Solid Waste Auth.*, 600 F. Supp. 1369 (D. Del. 1985).

[12] The First Circuit in *DeVito* affirmed the district court's opinion "for substantially the reasons stated therein." 947 F.2d at 1004.

These divergent results cannot be explained solely by variations in the particular flow control laws being considered. Rather, the decisions reveal fundamental differences in the analytical framework within which the Commerce Clause inquiry is conducted.

At the outset, there is no consensus among the lower courts as to the Commerce Clause significance of the fact that a flow control law, by forcing trash to go to a particular facility, necessarily restricts the export of trash to out-of-state points. The court below simply ignored the export restriction and upheld the law after concluding that trash originating in the state or locality is not treated more favorably than trash originating elsewhere. Pet. App. 11a. The Third Circuit in *J. Filiberto* concluded that as long as the trash ultimately finds its way into the stream of interstate commerce, a law prohibiting its export except through a designated facility has "no demonstrable effect whatsoever on the interstate flow of goods." 857 F.2d at 922. And the Delaware court in *Harvey & Harvey* treated trash as an object with "a negative value," concluding on that basis that restrictions on its export will not "impose a significant economic burden on out-of-state economic interests." 600 F. Supp. at 1380.

In contrast, the Eighth Circuit and the First Circuit have treated the export-restricting aspect of flow control laws as placing such laws in the category of those that "overtly slow or freeze the flow of commerce." *DeVito*, 770 F. Supp. at 782 (citing *City of Philadelphia v. New Jersey*, 437 U.S. at 624). The Eighth Circuit in *Waste Systems* noted that restrictions on "export of in-state waste to out-of-state facilities" are subject to the Commerce Clause no less than import restrictions are. Slip op. at 9. In *Waste Recycling*, the Alabama district court

treated even an ordinance that expressly permitted the disposal of some trash out-of-state, subject to reporting requirements, as one that has "the practical effect of discriminating against the transport of solid waste." Slip op. at 23.

These divergent views as to the Commerce Clause implications of restrictions on exports have led directly to a division in the lower appellate courts over the criteria by which flow control laws should be judged—whether they have merely an incidental effect on interstate commerce and are thus subject to the liberal balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), or whether they fall in the category of protectionist restrictions on commerce itself, where a burden on interstate commerce can be justified only if the law advances legitimate local purposes that cannot be met by nondiscriminatory means. *See City of Philadelphia v. New Jersey*, 437 U.S. at 624. The court below applied the *Pike* test without discussion, concluding that the effect on interstate commerce was "incidental" and not "impermissibly burdensome" when "weighed against the legitimate and significant public concerns underlying the local law." Pet. App. at 12a. The Third Circuit in *J. Filiberto Sanitation*, a decision relied on by the court below, accepted as "legitimate, non-protectionist purposes" the claim that the regulations "rationally and efficiently organize the collection and disposition of solid waste" and "discourage illegal dumping by directing waste flows to prescribed disposal sites," 857 F.2d at 920, and indicated that a *Pike v. Bruce Church* balancing test would be appropriate.[13] Similarly, the New Jersey appellate court in *Fiorello Brothers* "applied the *Pike* test," 577 A.2d at 1323, in upholding a New Jersey flow control law.

[13] Because the Third Circuit concluded there was no burden at all on interstate commerce, it did not perform an actual balancing but did conclude that "the local benefits of the Rule are substantial." 857 F.2d at 922.

In contrast, the Eighth Circuit in *Waste Systems* held that because the flow control ordinances discriminated against interstate commerce, the more deferential analysis of *Pike* was not appropriate. That court further held that the plainly economic purpose of the ordinances—*i.e.*, to promote the financial success of the local disposal facility—rendered them *per se* invalid as protectionist. Slip op. at 13-14. Similarly, the *DeVito* opinion, which was "substantially" adopted by the First Circuit, focused on the fact that the "immediate purpose and effect" of the law was "to increase [the state entity's] revenues by preventing commercially generated waste from being transported out of Rhode Island" and concluded that this demonstrated "that the regulation is an essentially protectionist measure" subject to the *City of Philadelphia* standard. 770 F. Supp. at 781, *aff'd*, 947 F.2d 1004.

This same dichotomy runs through the decisions of the trial courts. Thus a federal district court in Alabama held three different types of flow-control ordinances to violate the Commerce Clause, reasoning that despite their variations all stem from "pure economic protectionism: to provide a sure source of income for the Authority by keeping locally generated solid waste out of interstate commerce. . . ." *Waste Recycling, Inc.*, slip op. at 28. Similarly, a North Carolina district court concluded that a flow control regulation "served as an essentially protectionist measure" and that its implementation "would be discriminatory in its practical effect and subject to 'per se' illegality analysis." *Container Corp.*, slip op. at 20, 21.

A federal district court in Delaware, on the other hand, rejected a Commerce Clause challenge to Delaware flow control laws, accepting general legislative recitals of purpose as demonstrating that the statute was "not a typical case of economic protectionism," and upholding the statute on the ground that 'the impact upon interstate commerce is [not] 'clearly excessive in relation to the

putative local benefits.'" *Harvey & Harvey*, 600 F. Supp. at 1380-81 (quoting *Pike v. Bruce Church*, 397 U.S. at 142).

These divergent approaches to the evaluation of the constitutionality of flow control laws can only be resolved by definitive guidance from this Court. Given the widespread prevalence of flow control laws, litigation over their validity under the Commerce Clause seems certain to continue. The issues have been thoroughly ventilated and it is unlikely that a consensus will emerge at the federal court of appeals and state supreme court level.

This case presents an ideal vehicle to resolve this important issue. The ordinance here involved is a comprehensive one—it applies to all trash in the state, regardless of whether the trash originated locally, in-state, or out-of-state. The ordinance is also straightforward—it requires all nonrecyclable trash, without exception, to go to the designated facility. The economic consequences of the ordinance are undisputed: the designated facility, charges $11 per ton more than petitioners' facility, and the waste being handled by petitioners results in a loss to the designated facility of "thousands of dollars daily in uncollected revenues as well as increasing the likelihood of TOWN's failure to meet its contractual obligation to the transfer station." Charles Holbrook Aff., Rec. 60.

A grant of certiorari in this case would thus permit this Court to provide urgently needed guidance to the lower courts concerning the key Commerce Clause issues raised by flow control laws, which have already been authorized in more than half of the states.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

[August 31, 1992]
Argued—November 21, 1991

91-07786
91-08409
91-09014

THE TOWN OF CLARKSTOWN,
respondent,

v

C & A CARBONE, INC., *et al.*,
appellants,
defendants.

OPINION & ORDER

APPEAL by the defendants C&A Carbone, Inc., Recycling Products of Rockland, Inc., C&C Realty, Inc., and Angelo Carbone, in an action, *inter alia*, to permanently enjoin violations of Local Laws, 1990, No. 9 of the Town of Clarkstown, (1) from an order of the Supreme Court (Robert J. Stolarik, J.), dated July 15, 1991, and entered in Rockland County, which granted the plaintiff's motion for summary judgment, (2) from a judgment of the same court dated July 31, 1991, which declared that Local Laws, 1990, No. 9 of the Town of Clarkstown is valid and that the appellants are in violation thereof, permanently enjoined the appellants from operating their business at their premises located at 183 Western High-

way, West Nyack, in Rockland County, in violation of that local law, and directed that the appellants immediately cease all operations in violation of that local law and Town of Clarkstown Code chapter 106, and (3) as limited by their brief, from so much of an order of the same court dated September 16, 1991, as, upon reargument and renewal, adhered to the original determination.

Granik Silverman Sandberg Campbell Nowicki Resnik, New City, N.Y. (Morrie Slifkin, David W. Silverman, Kenneth H. Resnik, and Ricki H. Berger of counsel), for appellants.

Richard A. Glickel, West Nyack, N.Y., for respondent.

HARWOOD, J.

On this appeal, we examine the constitutionality of a local law which mandates that all solid waste processed or otherwise handled within the locality be processed or handled at a designated facility. In light of the health, safety, and environmental concerns connected with solid waste management and disposal, we conclude that the challenged local law constitutes a valid exercise of the locality's police power which offends neither the Commerce Clause of the United States Constitution nor the Due Process Clauses of the United States and New York State Constitutions. We therefore uphold the judgment of the Supreme Court which enjoins the appellants from violating that law.

The appellant C&C Realty, Inc. (hereinafter C&C) is the owner of property located within the plaintiff Town of Clarkstown at 183 Western Highway, West Nyack, in Rockland County. The appellant C&A Carbone, Inc. (hereinafter C&A), of which the appellant Carbone is an officer, and the appellant Recycling Products of Rockland, Inc. (hereinafter Recycling), of which the appellant Carbone is part owner, are interrelated corporations which, according to a complaint the corporate appellants filed in the United States District Court for the Southern District of New York, are in the "interstate business" of bringing

to the Western Highway premises "certain waste materials" which are sorted "into waste which is recyclable and waste which is not recyclable" and then shipped to disposal facilities outside the state. On July 17, 1987, the New York State Department of Environmental Conservation (hereinafter the DEC) issued to C&A a permit authorizing it to operate at the Western Highway site, on certain conditions and with limited permission to manage recyclables, a "Transfer Station", which is presently defined by New York State regulations as a "solid waste management facility other than a recyclables handling and recovery facility * * * where solid waste is taken from the collection vehicles and placed in other transportation units for movement to another solid waste management facility" (6 NYCRR 360-1.2[b][15]). The appellants assert that the "tipping fee" presently charged to truckers and haulers using the Western Highway facility is $70 per ton, which fee the appellants are apparently free to lower or raise as they see fit. The initial expiration date on C&A's permit was July 31, 1992, and the appellants acknowledge that if a permit were to be issued today, or if the current permit were to be renewed, it would be subject to the more stringent regulations promulgated after enactment of the Solid Waste Management Act of 1988 (*see*, L 1988, ch 70).

On August 7, 1989, the Town and the DEC entered into a consent decree to close a municipal landfill located on Route 303 in West Nyack which had been operated by the Town since in or about 1950, and which, from the early 1970's, when the State adopted a comprehensive refuse and solid waste regulatory scheme (*see*, ECL art 27), was periodically cited for environmental violations. Pursuant to the 1989 consent decree the Town was required to develop and implement a remedial plan which would address the adverse environmental consequences caused by the landfill and by its closing. In contemplation thereof, the Town filed an Environmental Assessment Form for the construction of a Solid Waste Trans-

fer Station at the Route 303 site. In June 1989 based in part on a report which is not included in the record before us, and following a public comment period, the Town issued a negative declaration that the construction and operation of a town transfer station on the closed landfill site would not have a significant impact on the environment (*see*, ECL 8-0109[4]; *see also*, 6 NYCRR 617.8 [e][1][ii]). It also determined that no further proceedings pursuant to the New York State Environmental Quality Review Act (hereinafter SEQRA) (*see*, ECL article 8) were required.

In January 1990 the Town, in furtherance of its remedial plan, awarded Clarkstown Recycling Center, Inc. (hereinafter Clarkstown Recycling) the contract for construction and operation of the Town transfer station. Pursuant to the contract with Clarkstown Recycling, the Town is obligated to deliver to the transfer facility a specified annual tonnage of acceptable waste, and the Town must pay Clarkstown Recyling a penalty if less than the specified amount of waste is delivered. Apparently in accordance with a Town resolution, Clarkstown Recycling is permitted to charge haulers $81 per ton to dispose of solid waste, without regard to its point of origin. After five years, the Town may acquire the facility for $1. Various site and other approvals were issued by the DEC and, in December 1990 the DEC issued a permit authorizing Clarkstown Recycling to operate a solid waste transfer station at the Route 303 site and, in that regard, to accept, exclusive of source-separated recyclables, up to 600 tons of solid waste per day and to conduct limited recycling activities. The initial expiration date on the Clarkstown Recycling transfer station permit is December 31, 1995.

In addition, the Town, pursuant to its remedial plan, amended its zoning code to provide that the Town shall have only one designated "transfer station", which it defined as "an area of land upon which is located * * * structures, machinery and/or other devices where any solid waste * * * is taken from a collection vehicle and placed either upon the land, into any other transportation unit, or into any other device for future movement to another location" (*see*, Town of Clarkstown Zoning Code § 106-3). The zoning code was also amended to define a "[r]ecycling [f]acility" as "[a]n area of land upon which is located, permanently or temporarily, structures, machinery, and/or other devices which are utilized to separate, process, modify, convert, treat, boil, compact or prepare solid waste * * * so * * * any component part of same may be recovered".

In addition to amending its zoning ordinance, the Town enacted Local Laws 1990, No. 9 of the Town of Clarkstown, governing "Solid Waste Transportation and Disposal". Its stated purpose is to ensure that all solid waste "within or generated within the Town" other than sludge and certain hazardous and pathological wastes which could not be disposed of within the Town, is delivered to the Town's "solid waste" facility located at the Route 303 site or to a Town-approved recycling center (Local Laws, 1990, No. 9 of the Town of Clarkstown, § 2[A]). The local law specifically requires that all acceptable solid waste generated within the Town must "be transported and delivered" to the Route 303 facility or to Town-approved recycling centers and that "as to" solid waste brought to a recycling center, the unrecycled residue "shall be disposed of" at the Town's "solid waste facility", except "for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered facilities within the Town as aforesaid, or to sites outside the Town" (Local Laws, 1990, No. 9 of the Town of Clarkstown, § 3[A], [B], [C]). The local law separately provides that it is unlawful to import waste from outside the Town and "dump same" on property within the Town (*see*, Local Laws 1990, No. 9 of the Town of Clarkstown § 5[B]),

but waste generated outside the Town is otherwise to be handled in the same manner as waste generated in the Town, and, in that regard, the local law renders it unlawful within the Town to "dispose" or "attempt to dispose" of solid waste generated or collected outside the Town except for waste "disposed of" at the Town-operated facility and except for recyclables brought to a recycling center established by special permit (Local Laws, 1990, No. 9 of the Town of Clarkstown § 5[A]). Finally, the local law provides for the adoption by resolution "from time to time" as to fees to be collected at Town facilities (*see*, Local Laws, 1990, No. 9 of the Town of Clarkstown, § 6), but there is nothing to suggest, and no claim is made in this action, that point of origin has any bearing on the fees to be collected.

By order dated February 27, 1991, as a result of litigation which is not presently before us, the Supreme Court directed the Town to issue to the appellant C&A a special permit, subject to reasonable conditions, authorizing it to operate a recycling center at the Western Highway site. In March 1991 a tractor-trailer containing 23 bales of solid waste became disabled following an accident on the Palisades Interstate Parkway. On-site police investigation revealed that the vehicle, which bore an Ohio registration, contained household-type garbage originating within the Town, within a neighboring Town, and in New Jersey, that the shipper was the appellant C&A, and that the destination for the 46,440-pound-load was Wabash, Indiana. Town police thereafter observed other tractor trailers entering and leaving the Western Highway premises, and those vehicles proved to hold solid waste, not recyclable materials, originating within and outside the Town and headed for locations in Illinois, Indiana, West Virginia and Florida.

The Town immediately commenced the instant action for a permanent injunction prohibiting violations of Local Laws 1990, No. 9 of the Town of Clarkstown and simul-

taneously sought a preliminary injunction, urging that the appellants' conduct was depriving the Town of thousands of dollars daily in uncollected revenues. Shortly thereafter, and before answering in this litigation, the corporate appellants commenced an action in the United States District Court for the Southern District of New York for injunctive relief and damages. They, too, sought a preliminary injunction. The District Court (Brieant, J.), by order dated July 11, 1991, dismissed all the antitrust claims on the merits but preliminarily enjoined the Town from enforcing Local Laws 1990, No. 9 of the Town of Clarkstown, except insofar as it concerned solid waste generated solely within the Town, on the ground that the corporate appellants had demonstrated a likelihood of establishing that the local law constitutes an unreasonable, discriminatory, and impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

Four days later, on July 15, 1991, the Supreme Court, acting upon the parties' stipulation to treat the Town's motion for a preliminary injunction as one for summary judgment, declined to dismiss the action on constitutional grounds as requested by the appellants, and granted the Town summary judgment. By judgment dated July 31, 1991, the court declared that Local Laws, 1990, No. 9 of the Town of Clarkstown is valid, ruled that the appellants are in violation thereof, and permanently enjoined them from operating their businesses at the Western Highway site in violation of the local law and in violation of Town of Clarkstown Code chapter 106. The Federal action was thereafter discontinued.

Although the appellants have urged, somewhat inconsistently, that they are operating only a recycling center, and, by implication, that they are not violating any Town law, they contend here, as they did before the Supreme Court, *inter alia*, that the local law violates the Commerce Clause of the United States Constitution (*see*, US Const,

art I, § 8), that the application of the local law as applied to them constitutes a taking of property in violation of the Due Process Clauses of the New York State and United States Constitutions (*see*, US Const, 5th, 14th Amends; NY Const, art I, § 7), that the local law was enacted for economic rather than public health and welfare reasons and was therefore beyond the scope of the Town's police powers, and that the local law was enacted in violation of SEQRA (*see*, ECL art 8) because no negative or other declaration was filed with respect to its enactment. We note that the appellants interpose no direct challenge to Town of Clarkstown Code chapter 106 on the ground that it permits only one transfer station within the Town. The appellants make no claim that their existing facility constitutes a legal nonconforming use (*cf., Town of Islip v. Zalak*, 165 AD2d 83; *Niagara Recycling v. Town Bd. of Niagara*, 83 AD2d 316; *see also, Moran v. Village of Philmont*, 147 AD2d 230, 234). Perhaps because of the lapse of time (*see*, CPLR 217), the appellants do not challenge on appeal the negative declaration issued in June 1989 when construction of the Town's transfer station was made part of the Town's remedial plan.

We agree with the Supreme Court that the appellants have no standing to challenge the adequacy of the Town's environmental review. Although the appellants' economic concerns do not deprive them of standing to also complain of environmental injury (*see, Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 777), the appellants are aggrieved only economically by the enactment of the local law (*see, Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 NY2d 428). Neither that economic injury, nor the status of C&C as an owner of property within the Town, is sufficient under the facts of this case to confer standing on the appellants to challenge the Town's failure to separately issue environmental declarations with respect to that part of the Town's remedial plan which requires that all solid waste which is

processed or handled within the Town be processed or handled at the Town's transfer station (*see, Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, supra*; *cf.*, 6 NYCRR 617.13[d][15]; *Montes Waste Sys. v. Town of Oyster Bay*, 150 Misc 2d 109). We note, moreover, that the record demonstrates that the overall plan was the subject of adequate environmental review (*see, Matter of Har Enters. v. Town of Brookhaven*, 74 NY2d 524; *cf., Montes Waste Sys. v. Town of Oyster Bay, supra*).

The appellants' claim that the enactment of the local law was financially motivated and thus beyond the scope of the Town's police powers is without merit. Local governments have long been authorized to enact laws relating to the "safety, health and well-being of persons or property" (NY Const, art IX, § 2[c][10]) and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments (*see, e.g.*, Town Law §§ 130[6], 136[8], 198[9], 221), is fundamentally related to the public health and welfare (*see e.g., Monroe-Livingston Sanitary Landfill v. Town of Caledonia*, 51 NY2d 679; *Town of Islip v. Zalak, supra*). Municipalities have thus heretofore been empowered to ban dumping (*see, Wiggins v. Town of Somers*, 4 NY2d 215), to grant exclusive franchises for the collection of disposal of waste (*see, City of Rochester v. Gutberlett*, 211 NY 309), and to prohibit outright the establishment of commercial and private disposal facilities (*see, Monroe-Livingston Sanitary Landfill v. Town of Caledonia, supra*; *Town of LaGrange v. Giovenetti Enters*, 123 AD2d 688).

More recent legislative responses (*see, e.g.*, L 1983, ch 544; L 1988, ch 70; L 1991, ch 569) to what has become a national crisis (*see*, Weinberg, 1989 Supplementary Practice Commentary, McKinney's Cons Laws of NY, Book 17½, ECL 27-0106, 1992 Cumulative Annual Pocket Part, at 145), while obviously fostering State-wide or regional approaches designed to encourage "economical"

projects for present and future waste collection (*see*, ECL 27-0101[1]), also contemplate and encourage the active involvement of local governments in the development of local solutions and local plans such as that adopted here by the Town and approved by the DEC (*see*, ECL 27-0103, 27-0107; *cf.* Town Law § 221). A concern for the continued economic viability of a solid waste management facility established pursuant to such a plan does not negate or detract from, but in fact is a part of the health, safety, and environmental concerns such plan is designed to address (*see*, *Town of North Hempstead v. Village of Westbury*, —— AD2d —— [2d Dept., Aug. 17, 1992]). Indeed, like the enabling legislation (*see*, L 1983, ch 544) concerning solid waste management in the Town of North Hempstead which we have recently upheld (*Town of North Hempstead v. Village of Westbury*, *supra*), the newly-enacted "Holland-Gromack" law (*see*, L 1991, ch 569) authorizes municipalities within the County of Rockland to adopt local laws which impose "appropriate and reasonable limitations on competition" in solid waste management, *inter alia*, by requiring that all solid waste generated or brought within their boundaries be delivered to specified facilities, thus confirming the "governmental and public purpose" of "displacing competition" so that public welfare rather than profit is the focus of solid waste management. The appellants have thus failed to sustain their heavy burden of demonstrating that the economic aspects of the Town's remedial plan render Local Laws, 1990, No. 9 of the Town of Clarkstown an unconstitutional exercise of the Town's police power.

That enactment of Local Laws, 1990, No. 9 of the Town of Clarkstown is within the scope of the Town's police power does not end our inquiry. As noted, the appellants also urge that the local law constitutes an unreasonable, discriminatory burden on interstate commerce and that its application as to them constitutes an unlawful taking of property, violating their constitutional rights of due process of law. But while neither argument is without

merit, neither justifies the extraordinary step of invalidating the local law (*see*, *41 Kew Gardens Rd. Assocs. v. Tyburski*, 70 NY2d 325, 333; *Lighthouse Shores v. Town of Islip*, 41 NY2d 7; *see also*, *St. Aubin v. Flacke*, 68 NY2d 66; *cf.*, *Fred F. French Investing Co. v. City of New York*, 39 NY2d 587, 595).

It is now beyond dispute that "garbage" is an article of commerce within the meaning of the Commerce Clause of the United States Constitution (*see*, *Philadelphia v. New Jersey*, 437 US 617). It is also well settled that neither the several states nor their municipalities may isolate themselves from a solid waste problem common to all the states by erecting discriminatory barriers to the free flow of commerce (*see*, *City of Philadelphia v. New Jersey*, *supra*; *Chemical Waste Management v. Hunt*, —— US —— [June 1, 1992]; *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, —— US —— [June 1, 1992]; *see also*, *Dutchess Sanitation Serv. v. Town of Plattekill*, 51 NY2d 670). However, the Commerce Clause protects the interstate market, not particular interstate firms (*see*, *Exxon Corp. v. Governor of Maryland*, 437 US 117, 127-128), and the "simple answer to [the appellants'] argument is that the legislation does not discriminate against interstate commerce" (*Niagara Recycling v. Town of Niagara*, *supra*, at 332) because, unlike State or local legislation at issue in most of the cases on which the appellants rely (*see*, *e.g.*, *Chemical Waste Management v. Hunt*, *supra*; *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, *supra*; *Philadelphia v. New Jersey*, *supra*; *Dutchess Sanitation Serv. v. Town of Plattekill*, *supra*), the local law in issue here imposes no special fees, taxes, prohibitions, or duties on those transporting out-of-state articles of commerce. Rather, the local law applies evenhandedly to all solid waste processed within the Town, regardless of point of origin (*see*, *Exxon Corp. v. Governor of Maryland*, *supra*; *Head v. New Mexico Bd. of Examiners in Optometry*, 374 US 424; *Huron Portland Cement Co. v.*

City of Detroit, Michigan, 362 US 440, 442, 448; *J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection*, 857 F2d 913) Moreover, were we to assume that the presently-existing $11 difference between the Town tipping fee and the fee the appellants have chosen to impose has any effect on the interstate flow of solid waste (*cf., Monroe-Livingston Sanitary Landfill v. Town of Caledonia, supra*, at 684; *Town of LaGrange v. Giovenetti Enterprises, supra*; *bui see, J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Envl. Protection, supra*, at 922), there is no evidence before us which suggests that what can have nothing more than an incidental effect on interstate commerce is impermissibly burdensome (*see, Exxon Corp. v. Governor of Maryland, supra*, at 127-128; *see also J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*), particularly when the "burden" is weighed against the legitimate and significant public concerns underlying the local law (*cf., Pike v. Bruce Church, Inc.*, 397 US 137, 142; *see, J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*, at 915).

The ruling by the United States District Court for the Southern District of New York on the corporate appellants' motion for a preliminary injunction does not require that we rule in their favor here (*cf., Guggenheimer v. Ginzburg*, 43 NY2d 268, 272; *Niagara Recycling v. Town of Niagara, supra*, at 324), and we conclude that the appellants' interstate commerce claim is insufficient to justify denying the Town summary judgment (*see, J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*).

Although the appellants have not established the existence of an issue as to whether Local Laws, 1990, No. 9 of the Town of Clarkstown impermissibly burdens interstate commerce, the potential effect on their business does require that we review their claim that the local law works as a taking violative of their due process rights (*see, e.g., Birnbaum v. State of New York*, 73

NY2d 638; *Rochester Gas & Elec. Corp. v. Public Serv. Comm. of State of N.Y.*, 71 NY2d 313; *Niagara Recycling v. Town of Niagara, supra*; *cf., Town of Islip v. Zalak, supra*). However, the appellants may operate a recycling facility at the Western Highway site. Further, they do not directly claim, and the record does not suggest, that Local Laws 1990, No. 9 of the Town of Clarkstown deprives the appellants of all economically viable uses of the Western Highway property held by the appellant C&C (*see generally, Lucas v. South Carolina Coastal Council*, —— US —— [June 29, 1992]; *St. Aubin v. Flacke, supra*; *French Investing Co. v. City of New York, supra*; *cf., Town of Islip v. Zalak, supra*). Furthermore, while the appellants may have had some vested interest in the permit to operate a transfer station at the Western Highway site (*see, Niagara Recycling v. Town of Niagara, supra*; *cf., Allied Grocers Cooperative v. Tax Appeals Tribunal*, 162 AD2d 791), the expiration of that permit on July 31, 1992, renders moot any claim that the local law retrospectively diminished or retroactively invalidated vested rights. In light of the close relation of the local law to the promotion of health, safety and welfare of society (*see, Niagara Recycling v. Town of Niagara, supra*; *see also, Empire State Assn. of Adult Homes v. Perales*, 139 AD2d 41, 44; *Moran v. Village of Philmont*, 147 AD2d 230, *supra*; *J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*), the acute public interest in the proper and safe management of solid waste (*cf., e.g., Niagara Recycling v. Town of Niagara, supra*, at 327; *see, J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*), the appellants' obvious knowledge that their business was and would be increasingly heavily regulated (*cf., Birnbaum v. State of New York, supra*), and the appellants' heavy burden of overcoming the presumption of constitutionality which attaches to the local law (*St. Aubin v. Flacke, supra*, at 76; *French Investing Co. v. City of New York, supra*; *cf., Lighthouse Shores v. Town of Islip*, 41 NY2d 7, *su-*

pra), there are no issues of fact warranting trial of the appellants' due process claims. In fact, what emerges from the appellants' multi-pronged challenge to Local Laws, 1990, No. 9 of the Town of Clarkstown is a singular complaint that its enactment adversely affects competition in the solid waste industry (*but see, Exxon Corp. v. Governor of Maryland, supra*, at 129-134), a claim the appellants unsuccessfully pressed in the United States District Court. That claim does not include a challenge to the validity of the "Holland-Gromack" law which confirms the Town's authority to limit or displace competition (*see*, L 1991, ch. 569) and the constitutionality of which in any event is not before us (*see*, CPLR 1012[b]; *Jefferds v. Ellis*, 122 AD2d 595). Under the circumstances, we uphold Supreme Court's determination granting the Town summary judgment.

The appeal from the order dated July 15, 1991, is dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see, Matter of Aho*, 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeals from the judgment (*see*, CPLR 5501[a][1]), and the order dated September 16, 1991, made upon reargument. Further, the appeal from the judgment is dismissed, since it was superseded by the order dated September 16, 1991. The order dated September 16, 1991, is affirmed insofar as appeal from.

THOMPSON, J.P., BRACKEN and MILLER, JJ., concur.

ORDERED that the appeal from the order dated July 15, 1991 is dismissed; and it is further,

ORDERED that the appeal from the judgment dated July 31, 1991, is dismissed as the judgment was superseded by the order dated September 16, 1991, made upon reargument; and it is further,

ORDERED that the order dated September 16, 1991, is affirmed insofar as appealed from; and it is further,

ORDERED that the respondent is awarded one bill of costs.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

APPENDIX B

SUPREME COURT—
STATE OF NEW YORK

Trial Special Term Part—Rockland County

PRESENT: HON. ROBERT J. STOLARIK, JUSTICE

Index Number 1549 1991

Motion Date August 16, 1991

Motion Cal. Number 8

THE TOWN OF CLARKSTOWN,
Plaintiff,

—against—

C&A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C&C REALTY, INC., ANGELO CARBONE and "JOHN DOE 1 through 6",
Defendants.

[September 16, 1991]

		Papers Numbered
Notice of Motion/Order to Show Cause—Affidavits	defendants	1
	plaintiff	2
Answering Affidavits	defendants	3, 4
Replying Affidavits	plaintiff	5
Affidavits Filed Papers memorandum of law—	defendants	6
memorandum of law—	plaintiff	7

Upon the foregoing papers it is ORDERED that this motion for reargument is granted and upon reargument the Court adheres to its original determination. The findings herein are deemed to be incorporated in the Court's decision and order dated July 15, 1991.

Defendants make three arguments with respect to reargument, that the Court failed to provide "due and great respect" to a prior Federal Court decision of July 11, 1991, that the Court failed to consider the "balancing test" with respect to interstate commerce and that the recently passed Holland/Gromack bill deprives the plaintiff of the authority to enact the provisions of Local Law No. 9.

Holland/Gromack Bill

A reading of the Holland/Gromack bill reveals that it recognizes the authority of local municipalities to adopt "local laws, ordinance and regulations . . . . to displace competition". In addition, the Holland/Gromack bill specifically recognizes the authority of the County of Rockland and its municipalities to require that ". . . . all solid waste generated, originated *or brought within their respective boundaries* . . . . shall be delivered to a specified solid waste management-resource recovery facility . . . ." [Emphasis supplied]. Defendants' contention that the Holland/Gromack bill deprives Clarkstown of the power to enact Local Law No. 9 constitutes a misreading of its provisions.

Due & Great Respect

On July 11, 1991, the United States District Court, Southern District of New York granted a preliminary injunction preventing enforcement of the provisions of Local Law No. 9, finding that defendants herein had demonstrated a likelihood of success upon the merits of the commerce clause issue. On July 15, 1991, this Court granted summary judgment finding there was no legal merit to defendants' contention that Local Law No. 9

violated the commerce clause. Prior to rendering its July 15, 1991 decision and order, this Court reviewed the July 11, 1991 Southern District decision to determine whether there was any res judicata/collateral estoppel effect. Since the Federal decision contained no findings on the merits, this Court was not bound by its determination and proceeded to determine the merits of the defendants' commerce clause claim.

There is no legal basis for an assertion that this Court should have deferred to the Federal Court's preliminary injunction decision.

Commerce Clause

When defendants assert that a local ordinance is unconstitutional, they are faced with an "exceedingly strong presumption of constitutionality". Although this "presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt". *Stepping Stone Associates v. City of White Plains* 100 AD2d 619, 620; affd. 64 N.Y. 2d 690; Statutes, § 150 subd.(b).

In litigating the motion for summary judgment, both parties were required to avoid conclusory allegations and come forward to lay bare their proof, *Hanson v. Ontario Milk Producers Corp., Inc.*, 58 Misc. 2d 138. Defendants' failure to respond to the factual allegations contained in the plaintiff's moving papers constituted an admission of the facts contained therein. *Kuchne v. Nagel Inc. v. Baiden* 36 NY2d 539.

Defendants' papers contained only conclusory allegations. They failed to provide the Court with any evidentiary facts concerning the nature of their alleged interstate commerce activities. A reading of the July 15, 1991 decision which expressed concern about the source of defendants' solid waste should have made this apparent to the defendants. Faced with the heavy burden of demonstrating unconstitutionality, the defendants were required

to lay bare their proof and inform the Court of the details of their "interstate" operations. This Court again refers defendants to the uncontroverted evidentiary facts in the plaintiff's moving papers, i.e. that defendants' "interstate" refuse is being transported from Bergen County, New Jersey in violation of New Jersey law, which requires that Bergen County refuse be taken to the Bergen County transfer station.

Plaintiffs presented uncontroverted evidence of defendants' violation of Local Law No. 9 whereas defendants simply presented the Court with the conclusory allegation that Local Law No. 9 was "per se" violative of the provisions of the commerce clause.

Defendants now allege that the Court should have applied the "balancing test" of *Pike v. Bruce* 397 US 137. The application of such a test results in the same conclusion. Defendants have failed to demonstrate with evidentiary facts that the burden imposed on interstate commerce, if any, is "clearly excessive in relation to the putative local benefits." *Pike*, supra, 142. The legitimate local purpose of Local Law No. 9 is the regulation and control of solid waste disposal within the Town of Clarkstown. Having found a legitimate "local purpose", the Court is required to apply a balancing test comparing the extent of the burden on interstate commerce with the nature of the local interest involved. Defendants have, however, provided the Court with very little information regarding the alleged burden Local Law No. 9 imposes on interstate commerce. The $11.00 per ton cost differential between defendants' present operation which bypasses plaintiff's transfer station and the requirement of Local Law No. 9, which requires that defendants transport the "residue" from their recycling operation to the plaintiff's designated transfer facility does not, by itself, constitute a sufficient burden on interstate commerce to render the Local Law unconstitutional. "Cost taken into consideration with other factors might be relevant in some

cases to the issue of burden on commerce." *Bibb v. Navajo Freight Lines* 359 U.S. 520, 526. In the instant case, defendants have failed to inform the Court of any other effect which Local Law No. 9 has on interstate commerce. Defendants have failed to demonstrate factually the extent to which their operation or the operation of out-of-state entities with whom they are doing business, are being affected by this Local Law. In *Pike v. Bruce Church*, supra, 1 at 177, the fruit growing company which was contesting the Arizona regulation, clearly demonstrated that compliance with the regulation would cause the company to construct a $200,000.00 packing facility which would take many months to construct. The Supreme Court found that the imposition of such a heavy burden on the company was excessive when compared with the purpose for which the regulation was enacted, i.e., to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging. In *Bibb*, supra, 527-528, the interstate freight shippers made a significant factual showing of how the Illinois truck mudguard requirement seriously interfered with the operations of motor carriers.

The purpose underlying the local regulation is far more compelling than the purpose of the Arizona regulation. The instant regulation is directly related to the control and regulation of solid waste disposed within the Town of Clarkstown.

Dated September 16, 1991

/s/ Robert J. Stolarik
ROBERT J. STOLARIK, J.S.C.

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APPENDIX C

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF ROCKLAND

Index No. 1549/91

Mot. Date: 4/19/91

Mot. Cal. No. 8

THE TOWN OF CLARKSTOWN,
Plaintiff,

-against-

C&A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C&C REALTY, INC., ANGELO CARBONE and "JOHN DOE 1 through 6",
Defendants.

[July 15, 1991]

DECISION AND ORDER

STOLARIK, J.,

This is an action by the plaintiff seeking a permanent injunction prohibiting the defendants (1) from operating a transfer station at 183 Western Highway, West Nyack, New York, (2) from unlawfully disposing of solid waste in violation of the provisions of Clarkstown Local Law #9 of 1990 and (3) from conducting illegal business operations at 183 Western Highway.

This was originally a motion for a preliminary injunction, but the parties have stipulated to permit the Court to treat this as a motion for summary judgment. The Court has afforded both parties the opportunity to submit additional affidavits, evidence and memoranda of law.

Chapter 106 of the Clarkstown Zoning Code provides that there shall be only one lawfully designated "transfer station" for the Town of Clarkstown. A "transfer station" is not a permitted use under the zoning code, other than the Town's own facility. The Town Zoning Code defines a "transfer station" as "an area of land upon which is located, permanently or temporarily, structures, machinery and/or other devices where any solid waste, refuse, leaves, trash, trees or soil is taken from a collection vehicle and placed either upon the land, into any other transportation unit or in any other device for future movement to another location." Clarkstown Zoning Code § 106-3. p. 10620.

New York State regulations define a "transfer station" as "a solid waste management facility, other than a recyclables building and recovery facility exclusively handling nonputrescible recyclables, that can have a combination of structures, machinery or devices, where solid waste is taken from collection vehicles and placed in other transportation units for movement to another solid waste management facility". 6 NYCRR § 360-1.2,(b)(157).

The Town Zoning Code defines a "recycling facility" as "An area of land upon which is located, permanently or temporarily, structures, machinery and/or other devices which are utilized to separate, process, modify, convert, treat, boil, compost, compact or prepare solid waste, refuse, leaves, trash, trees or soil, so thus any component part of the same may be recovered." Clarkstown Zoning Code § 106.3, p. 10615.

"Recyclables" are defined as "solid waste that exhibits the potential to be used repeatedly in place of virgin material." 6 NYCRR § 360-1.2(b)(120).

A "recyclables handling and recovery facility" is a "solid waste management facility, other than collection and transfer vehicles, at which recyclables are separated from the solid waste stream, or at which previously sepa-

rated recyclables are collected." 6NYCRR § 360-1.2(b)(121).

A "solid waste management facility" is "any facility employed beyond the initial solid waste collection process and managing solid waste including but not limited to: storage areas or facilities; transfer stations; . . . . recyclables handling and recovery facilities." 6 NYCRR § 360-1.2 (b)(145).

Local Law No. 9 of the Town of Clarkstown enacted on December 31, 1990, provides as follows:

"Section 3.

C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid, or to sites outside the Town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown.

A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable

waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code."

"Residue" is defined as all solid waste remaining after treatment and, includes but is not limited to ash residue and other solid waste which is not recovered or combusted. 6NYCRR § 360-1.2(b)(129).

The planning, approval and construction of the Town's solid waste management facility (transfer station) was a result of the forced closure of the Clarkstown landfill by the New York State Department of Environmental Conservation. By DEC order of August 7, 1989, the town was required to construct and operate a solid waste transfer station at the site of its old landfill. The Town prepared a full Environmental Assessment Form (EAF) and a negative declaration was adopted by the Town Board on June 21, 1990 with regard to the construction of the proposed transfer station. Following a review of proposals, the Town selected Clarkstown Recycling Center, Inc. to operate its transfer station. As part of its contractual arrangement with Clarkstown Recycling, the Town is committed to provide a minimum tonnage of solid waste to the town transfer station. The failure to deliver this minimum amount of solid waste would result in the payment of a monetary penalty by the Town.

The intent and purpose behind the Town's solid waste regulatory scheme is expressed in Local Law #9 of 1990, Section 2, paragraphs I and II. Clarkstown seeks to provide for the transportation and disposition of all acceptable solid waste generated within or brought into the Town at the Clarkstown solid waste facility (transfer station) or at any other facilities in the Town which are

approved for recycling, processing or other disposition or handling. The Town law was enacted to benefit the health, welfare and safety of the Town residents as an essential and proper exercise of its governmental functions.

The instant dispute originated from a tractor trailer accident which occurred on the Palisades Interstate Parkway (PIP) on March 9, 1991. A tractor trailer containing 23 bails of solid waste consisting of household garbage originating from Clarkstown, Orangetown, Nyack and Bergen County, New Jersey became disabled after striking the Route 59 overpass. On March 11 and 12, 1991, the Clarkstown Police seized six other trailers that had departed the defendants' Western Highway facility. The contents of these trailers were inspected at the Clarkstown transfer station and found to contain solid waste which had originated both within and without Clarkstown, not recyclables. (Plaintiff seized and inventoried the contents of these trailers to determine the source of the solid waste. Defendants do not dispute the results of plaintiff's inventory).

Plaintiffs contend that defendants are operating an illegal transfer station at the Western Highway facility. Defendants contend that they are operating a "recycling facility". Defendants allege that they receive waste at this facility from both out-of-state (defendants do not disclose the specific source of the out-of-state waste.) as well as parts of New York outside the Town of Clarkstown. After receiving the waste, it is "shaken down" or separated, the recyclables are removed and the remaining waste left after separation is shipped by ICC licensed truckers to the midwest and south to landfills, resource recovery sites and other disposal facilities in Ohio, Delaware, Pennsylvania, Kentucky, Indiana and Florida. Defendants process and ship over 150 tons of waste per week.

Based upon defendants' admission and the uncontroverted evidence herein, it is apparent that solid waste

originating in Clarkstown has been delivered to and shipped from the defendants' Western Highway facility, bypassing the Clarkstown transfer station in violation of the provisions of Local Law #9 of 1990, Section 3(C). In addition, defendants are admittedly not transporting the solid waste "residue" that results from the operation of their Western Highway facility to the Town transfer station as required by the provisions of Local Law #9 of 1990, Section 5(A).

Accordingly, if the Clarkstown statutory scheme is valid and constitutional, the plaintiffs would be entitled to a permanent injunction restraining defendants from operating in violation of the provisions of Local Law #9 of 1990.

However, defendants have interposed numerous defenses and a counterclaim which must be determined prior to the granting of any injunctive relief. The Court will discuss each of these, seriatim.

The Court should also note that defendants do not contest the validity of the Clarkstown Zoning ordinance which bars the operation of commercial solid waste transfer stations. (See *Town of LaGrange v. Giovenetti Enterprises, Inc.* 123 AD2d 688.)

FAILURE TO COMPLY WITH SEQRA

Defendants, via counterclaim in the nature of Article 78, contend that the Town of Clarkstown failed to comply with SEQRA prior to enacting the provisions of Local Law #9 of 1990.

The Court finds that defendants lack standing to challenge the Town's SEQRA compliance. "To qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature". *Mobil v. Syracuse Indus. Dev.* 76 NY 2d 428, 433, *Society of Plastics v. Suffolk* 77 NY2d 761, 777. At best, defendants have

demonstrated an injury that is economic in nature. They have made no attempt to indicate how the challenged Clarkstown waste disposal regulation scheme will harm the environment. In fact, it would appear that the regulatory scheme restricts the number of transfer/recycling stations and their methods of operation in a manner that would be beneficial to the environment.

However, even if defendants had standing to litigate the SEQRA issue, there is no merit to their contention that Clarkstown violated SEQRA in adopting Local Law #9 of 1990. As long as the proper SEQRA proceedings were followed in procuring the permit for the transfer station, and defendants do not contend they were not strictly followed, the passage of Local Law #9 of 1990 would constitute an exempt or Type II Action as "routine or continuing agency administration and management, not including new programs or major reordering of priorities." 6 NYCRR § 617.13[d][15]. The same conclusion was reached in *Vinnie Montes Water System v. Oyster Bay* 567 NYS2d 335, 337 (Sup. Ct. Nassau Cty. Jan. 1991) where a resolution designating an existing and properly authorized facility at an already established waste disposal site as the exclusive transfer station for Oyster Bay was held to be an exempt Type II action. As in the instant case, the Town of Oyster Bay had issued a negative declaration in conjunction with its initial application for a permit to operate the transfer station. Otherwise stated, the environmental impact of ". . . the overall project was comprehensively reviewed in conjunction with the permit approval for construction of the proposed solid waste transfer facility." *Vinnie Montes, supra* at 337.

BURDEN ON INTERSTATE COMMERCE

Defendants contend that the provisions of Local Law #9 of 1990 insofar as they require the "residue" of recycling operations for garbage originating within or without the Town of Clarkstown to be transferred to the

Clarkstown transfer station are violative of the interstate commerce clause (U.S. Const., Art. 1, § 8, cl.3).

There is no question that solid waste is an article of interstate commerce. *City of Philadelphia v. New Jersey* 437 US 617, 621-623. A reading of "commerce clause" cases indicates that the Supreme Court has been attentive to schemes which provide for economic isolation and protectionism, "while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people. Id. at 623-24. States clearly retain authority under the general police powers to regulate matters of "legitimate local concern" in spite of the effect it might have on interstate commerce. *Lewis v. B.T. Inv. Manager, Inc.* 447 US 27, 36.

Defendants contend that Local Law #9 affects both waste originating outside the State of New York and waste intended to be shipped outside New York State, thereby creating a barrier to an existing flow of interstate commerce. Defendants claim Local Law #9 constitutes "economic isolation" and protectionism by blocking the flow of interstate commerce at the New York border.

The Court finds defendants' arguments with respect to the commerce clause to be without merit. Local Law #9, unlike the New Jersey statute in *City of Philadelphia*, supra or the Town of Platekill ordinance in *Dutchess Sanitation Service v. Platekill* 51NY2d 670, does not discriminate against out-of-state waste. Local Law #9 provides equal treatment to out-of-state waste and to waste originating in the Town of Clarkstown. The statutory scheme does not block interstate waste at the New York border, or discriminate against out-of-state waste; it simply mandates that once out-of-state waste arrives within the Clarkstown border, it must be disposed of at the Clarkstown transfer station.

A similar statutory provision was analyzed in *J. Filiberto Sanitation, Inc. v. State of N.J. Dept. of Environ-*

mental Protection 857 F2d 913 (3rd Cir.). In that case, local carters claimed that a New Jersey regulation which required all waste collected in Hunterdon County be delivered to one designated facility for processing and subsequent disposal violated the interstate commerce clause. As in the instant situation, the carters were bypassing the designated transfer station and shipping waste directly to out-of-state facilities where the tipping fees were lower. The U.S. Circuit Court of Appeals found, in spite of the carters' contention that the sole purpose for the Hunterdon regulation was to guarantee profits to the designated transfer station operators, that there was no proof that the rule was protectionist. Rather, it was found that the rule was intended to effect the proper disposition of all trash, the reduction of truck traffic and to permit the governmental entity to enter into and meet long and short term contracts for final disposal. Since the regulation did not place any cognizable burden on interstate commerce, it did not violate the commerce clause.

As the parties attacking the Local Law, defendants bear the burden of showing discrimination. *Hughes v. Oklahoma* 441 US 322, at 336. In the instant case, they have failed to sustain this burden.

The reasoning and rationale of the J. Filiberto case are directly on point. The defendants have failed to demonstrate that Local Law #9 has any "demonstrable effect whatsoever on the interstate flow of goods". *Exxon Corp. v. Governor of Maryland* 437 US 117 at 126 n. 16. Regardless of whether the waste is shipped from the Clarkstown transfer station or the defendants' facility, it is destined for out-of-state landfills. As noted in *J. Filiberto*, supra at 921, a transfer "station is not in competition with out-of-state landfills. On the contrary, the station is their customer." Local Law #9 does not discriminate against interstate solid waste, nor does it favor local interests over those of foreign competitors.

Exxon, supra at 125, *J. Filiberto*, supra at 921. Rather, it treats all waste within the Town of Clarkstown in an evenhanded, equal manner requiring that same be processed at the Clarkstown transfer station for the identical tipping fees.

The economic injury alleged herein is an injury suffered by the in-state defendants not by out-of-state interests who are involved in interstate commerce. In *Exxon*, supra at 127, the Supreme Court rejected the "underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market."

The Court should also note that the uncontroverted evidence indicates that defendants are handling waste from Bergen County, New Jersey at their 183 Western Highway Facility in New York. Defendants do not controvert plaintiff's allegations that the removal of Bergen County waste to New York, bypassing Bergen County's mandatory transfer station is illegal under New Jersey law. (As previously noted, defendants have not chosen to inform the Court of the specific locations of the origin of their out-of-state waste.) However, it would appear that defendants' interstate commerce clause violation is based on the movement of solid waste from Bergen County, New Jersey to New York in violation of New Jersey law.

Otherwise stated, Local Law #9 is not a "protectionist" statute and is therefore not "per se" invalid. Rather, it is a statute which "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." *Lewis v. B.T. Investment*, supra, p. 36.

DUE PROCESS VIOLATION

Defendants allege that the provisions of Local Law #9 of 1990 effectively puts them out of business in violation of the due process clause of the 5th and 14th Amendments

of the U.S. Constitution. The Court finds this contention to be without merit.

The provisions of Local Law #9 of 1990 do not result in a "taking" of the defendants' business. A "taking" occurs only if:

> the effects of the action are so complete as to deprive the owner of all or most of its interest in the property. *Rochester Gas & Elec. v. PSC* 71 NY 2d 313.

The waste disposal industry is heavily regulated subject to numerous governmental regulations and licensing requirements. *Vinnie Montes Waste System v. Oyster Bay* 567 NYS2d 335, 338. Local Law #9 does not put defendants out of business. Defendants are still permitted to operate a recycling facility and transport solid waste for sorting and separation regardless of origin. Defendants have no property rights vested or otherwise in the continuing operation of their facility or in the profit generated thereby. *Presidents Council of Trade Waste Assn. v. City of N.Y.* 142 Misc 2d 135, aff'd. 159 AD2d 48.

As in *Exxon*, supra at 124, defendants' substantive due process claim in this action fails because the provisions of Local Law #9 of 1990 "bear a reasonable relation" to the Town's legitimate purpose in controlling and regulating solid waste disposal within the confines of the Town.

CONCLUSION

Since the provisions of Local Law #9 of 1990 are neither invalid nor unconstitutional, and the defendants are operating in admitted violation of its provisions, the plaintiff is entitled to injunctive relief.

Submit judgment on notice restraining the defendants from operating in violation of the provisions of Local Law #9 of 1990.

Counsel for all parties are directed to appear for the conduct of a preliminary conference at the undersigned's

chambers, Rockland County Courthouse, Main Street, New City, New York at *9:00 A.M. on Tuesday, August 6, 1991.* Counsel shall be prepared to discuss a timetable for disclosure in this action.

This decision constitutes the order of the Court.

Dated: New City, New York
July 15, 1991

/s/ Robert J. Stolarik
ROBERT J. STOLARIK
J.S.C.

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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91 Civ. 2105 (CLB)

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC. and C & C REALTY, INC.,
Plaintiffs,

-against-

THE TOWN OF CLARKSTOWN and CLARKSTOWN RECYCLING CENTER, INC.,
Defendants.

[July 11, 1991]

MEMORANDUM AND ORDER

Brieant, Chief Judge

On March 27, 1991 plaintiffs commenced this action alleging violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, Section 4 of the Clayton Act, 15 U.S.C. § 15, *et seq.*, and Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. § 1983. Plaintiffs seek injunctive relief and damages for injury to their business.

This Court has subject matter jurisdiction over the claims set forth in the complaint pursuant to Sections 1331, 1337 and 1343 of Title 28 of the United States Code. Since plaintiffs and defendants have their office and principal place of business in Clarkstown, New York, venue in this district is appropriate. 28 U.S.C. § 1391(c).

On June 5, 1991, the Court heard oral argument on (1) plaintiffs' motion for an Order of this Court granting a preliminary injunction against the enforcement of Local Law No. 9 of 1990 as adopted by the Town of

Clarkstown and (2) defendant Town of Clarkstown's motion to dismiss the complaint pursuant to Rule 12(b)(6) and/or for summary judgment pursuant to Rule 56 or, in the alternative, to dismiss or stay this case on abstention grounds. Both motions were marked fully submitted decision reserved on the same date.

The underlying facts are not in dispute. Plaintiffs are engaged in the business of recycling and solid waste disposal. Solid waste is brought to their facility in Clarkstown from both within and without New York State. This solid waste is processed for $70 per ton and that which is recyclable is baled or otherwise packaged and sold to facilities outside New York state. The remaining solid waste is baled and sold to "resource recovery centers" (or facilities which burn the solid waste to create power) or placed in landfills outside Clarkstown.

On August 7, 1989, Clarkstown entered into a consent order with the New York Department of Environmental Conservation which required the town to cease operations at its own landfill and establish a transfer station as an alternative method of managing the solid waste in the town. *See* Doc. No. 8, Ex. A. Thereafter, the town entered into an agreement with defendant Clarkstown Recycling whereby Clarkstown Recycling would build a transfer station facility and the town, in turn, would guarantee a certain amount of tonnage or suffer a penalty. *See* Doc. No. 9, Ex. A. Pursuant to the terms of this exclusive arrangement, Clarkstown Recycling is permitted to charge haulers $81 per ton to dispose of any and all solid waste that enters the territorial limits of Clarkstown, without regard to whether that solid waste is generated within or without Clarkstown. The agreement also provides that when the arrangement expires in five years, the Town can acquire the facility for $1.00.

In December of 1990, in aid of the arrangement, the town adopted Local Law No. 9 of 1990. Section 5(A) of Local Law No. 9 provides in relevant part:

> It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

On March 9, 1991, town police officers responded to a motor vehicle accident that had occurred on the Palisades Interstate Parkway when a tractor trailer struck the Route 59 overpass and spilled solid waste onto the parkway. *See* Dec. 11, Exs. C, D. The trailer was hauling solid waste from plaintiffs' facility to a landfill in Indiana. On March 13, 1991, the town police obtained a search warrant that directed them to search the plaintiffs' premises for books and records maintained in the business of solid waste disposal. On March 14, 1991, the town produced the property seized to a FBI agent pursuant to a grand jury subpoena signed by the U.S. Attorney for the Southern District of New York.

Then, on March 18, 1991, the town filed suit and brought an Order to Show Cause against C & A Carbone in the Supreme Court of the State of New York, Rockland County, seeking to enjoin and restrain C & A Carbone and others from "operating a transfer station and from unlawfully disposing of solid waste within the Town of Clarkstown," in violation of Local Law No. 9. On March 20, 1991, the State Court granted a temporary restraining order which provides in pertinent part that "the defendants [C & A Carbone, Inc., Recycling Products of Rockland, Inc., C & C Realty, Inc. and Angelo Carbone] be and they are hereby restrained and enjoined from operating a transfer station and from unlawfully disposing of solid waste generated within the Town of

Clarkstown, and the defendants shall immediately cease all illegal business operations at the premises known as 183 Western Highway, West Nyack, New York, pending the hearing of [the Town of Clarkstown's] motion. . . ." *See* Doc. 8, Ex. H. The town's motion for a preliminary injunction in the New York Supreme Court has been marked fully submitted, decision reserved by Justice Robert J. Stolarik.

Also pending in the New York Supreme Court, Appellate Division, Second Department, is the Town's appeal of the determination of the Hon. Alfred Weiner, Acting Supreme Court Justice, in a related Article 78 proceeding. By decision dated February 27, 1991, Justice Weiner ordered the Town Board of the Town of Clarkstown to issue plaintiffs a special permit to allow the maintenance and use of a portion of plaintiffs' site on Western Highway as a "recycling facility," as defined in Section 106.3 of the Zoning Code of the Town of Clarkstown. *See* Doc. 11, Ex. G.

The following constitutes this Court's findings and conclusions as required by Rule 65 of the Federal Rules of Civil Procedure and is the decision of this Court.

Antitrust

In the instant case, plaintiffs' first contention is that they are entitled to damages and injunctive relief under the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and the Clayton Act, 15 U.S.C. §§ 15 *et seq.* The federal law is clear, however, that neither form of relief is available to plaintiffs based on the alleged anti-competitive effect of the Local Law.

As a preliminary matter, this Court notes that local governments are immune to damage claims under the antitrust laws. *See* Local Government Antitrust Act. 15 U.S.C. §§ 34-36. Section 35(a) provides:

> No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c

of this title from any local government, or official or employee thereof acting in an official capacity.

15 U.S.C. § 35(a).

Regardless of the type of relief sought, a town is immune to claims asserted under the antitrust laws, where the State has authorized the anti-competitive actions complained of. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). It is undisputable that there are several New York statutes which authorize local control over the disposal and dumping of local garbage. *See* N.Y. Town Law, §§ 130, 198(9), 221 (McKinney 1987 & Supp. 1991); N.Y. Gen. Mun. Law § 120-w (McKinney 1986 & Supp. 1991). In addition, Environmental Conservation Law § 27-0711, N.Y. Envtl. Conserv. Law § 27-0711 (McKinney 1984 & Supp. 1991) expressly recognizes the significant role of local government in regulating solid waste management. As such, the state action exemption has been repeatedly recognized in cases dismissing antitrust claims based on local governments' actions regarding solid waste management. *See e.g., Hancock Industries v. Schaeffer*, 811 F.2d 225, 232-36 (3d Cir. 1987).

Our full understanding of this issue requires reference to the Supreme Court's recent decision in *City of Columbia, et al. v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 59 U.S.L.W. 4259 (April 1, 1991), in which the Court held the Sherman Act inapplicable to anti-competitive restraints imposed by local governments implementing state policy. The issue considered in *City of Columbia* was whether there is a "conspiracy" exception to the rule that any action that qualifies as a state action or an authorized implementation of a state policy is automatically thereby exempt from the operation of the antitrust laws.

Citing its landmark decision in *Parker v. Brown*, 317 U.S. 341 (1943) and relying on the principles of federalism and state sovereignty, a majority of the Court held that a city's restriction on billboard construction is

immune from federal antitrust liability where the municipalities' restriction is an authorized implementation of state policy. The Court rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade,'" *City of Columbia*, 59 U.S.L.W. at 4263, even if a state or its municipality acts as a conspirator with private actors in the restraint of trade.[1]

Since the anti-competitive provisions of Local Law 9 are the foreseeable result of New York State enabling law concerning solid waste collection and disposal and the Town of Clarkstown's Local Law is an implementation of authorized state policy, this Court is constrained to find that the conduct of the Town complained of is exempt under the antitrust laws. The Court further concludes that there is no genuine issue of material fact concerning either the Clayton Act or the Sherman Act claim and that defendant is entitled to a judgment on these claims as a matter of law. Accordingly, this Court denies so much of plaintiffs' motion based on these claims and grants defendant's motion for summary judgment insofar as these motions relate to the antitrust claims.

Civil Rights

In addition to those claims raised under the Sherman Act and the Clayton Act, plaintiffs also assert a claim based on a violation of their civil rights pursuant to 42 U.S.C. § 1983. In particular, plaintiffs assert that the Town's local law constitutes an unreasonable and therefore unlawful burden on interstate commerce, and deprives plaintiffs of their property without due process

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[1] The Court noted, however, that while such action may be exempt from the operation of the antitrust laws "Congress has passed other laws aimed at combatting corruption in state and local governments." *City of Columbia*, 59 U.S.L.W. at 4263.

and denies equal protection. The Town responds that the law fulfills a legitimate state purpose by reasonable means. This presents a triable issue.

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Thus, to establish a claim under Section 1983, plaintiffs would have to convince the trier of fact that (1) the conduct complained of was committed by persons acting under color of state law; (2) this conduct deprived plaintiffs of rights, privileges or immunities secured by the constitution or laws of the United States; and (3) that defendants' acts were the cause of injuries and/or consequent damages sustained by plaintiffs.

Most recently, in *Dennis v. Higgins*, —— U.S. ——, 59 U.S.L.W. 4117 (February 21, 1991), the Supreme Court recognized that claims based on a violation of the Commerce Clause are justiciable in this Court under 42 U.S.C. § 1983. In *Dennis*, the Court recognized that the Commerce Clause confers "rights, privileges, or immunities" upon persons within the meaning of Section 1983.

While the first element of the Section 1983 claim is met in that whatever defendant Town of Clarkstown did was action under color of state law, there is a factual dispute as to whether Local Law No. 9 deprives plaintiffs of their rights under the Commerce Clause and, if so, what damages plaintiffs sustained. Defendant's motion is denied to the extent it relates to this claim.

Seized Documents

Plaintiffs also seek to recover documents seized pursuant to the March 13, 1991 search warrant said to have been unreasonably retained in violation of the Fourth Amendment and Section 1983. Of course the town is entitled to retain the fruits of its duly authorized search but only so long as the exigencies of criminal prosecution require retention of the property as evidence. *In re Documents Seized Pursuant to Search Warrant*, 124 Misc. 2d 397, 478 N.Y.S.2d 490, 496 (1984). It is impossible, however, to resolve this issue of fact on a motion for summary judgment, so that portion of the defendant's motion is also denied.

Abstention

Alternatively, the Town requests that this Court abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) or *Younger v. Harris*, 401 U.S. 37 (1971).

As a matter of discretion this Court declines to abstain. Abstention is "the exception, not the rule," *Colorado River Water Conservation District*, 424 U.S. at 813-16, and "there is substantial authority for the proposition that abstention is not favored in [a] . . . civil rights case brought as was this one under 42 U.S.C. § 1983 and 28 U.S.C. § 1343." *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) (footnote omitted). In finding abstention inappropriate, this Court gives considerable weight to the fact that Section 1983 provides a unique federal remedy based on the Constitution and was enacted to redress inadequate state law remedies. *See Mitchum v. Foster*, 407 U.S. 225, 238-242 (1972).

This Court also concludes that abstention would not be justified under the doctrine of *Younger v. Harris, supra.* Contrary to defendants suggestion, "*Younger* abstention is [not] always appropriate whenever a civil proceeding is

pending in a state court." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 n.12 (1987). *Younger* abstention is appropriate only if (1) there are pending state judicial proceedings, (2) the state proceedings implicate important state interests, and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Arguably, the first and third requirement are satisfied in this case. The second is not, however, because this case does not implicate the kind of state interests that commands *Younger* abstention. Although the New York State Supreme Court necessarily has some interest in this proceeding, this Court is not convinced that an interest that is vital to the operation of state government is involved. As the Supreme Court cautioned in *Pennzoil*, *supra*, abstention under *Younger* is appropriate only "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil*, 481 U.S. at 11.

Preliminary Injunctive Relief

To obtain a preliminary injunction, the movant must demonstrate: "(a) irreparable harm [if the preliminary injunction does not issue] and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). *See Stormy Clime Ltd. v. Progroup, Inc.*, 809 F.2d 971, 973 (2d Cir. 1987). Therefore, to prevail on this motion, plaintiffs must show both that irreparable harm to it will result if enforcement of the Town's ordinance is not enjoined and that they are likely to prevail on the merits of the claims asserted.

Insofar as Local Law No. 9 limits or otherwise prohibits the disposal without the Town of *solid waste generated without the Town*,[2] but processed at plaintiff's facility in Clarkstown, the Court finds that plaintiffs have demonstrated a likelihood of success on the merits of their claim. Although ostensibly Local Law No. 9 was promulgated to protect the health and environment of the residents of Clarkstown from the hazards associated with dumping solid wastes in landfills, the Town cannot legislatively slow down or prohibit the flow of commerce, in this case, interstate solid waste products, by artificially inflating the price of processing solid waste generated without the Town from $70/ton to $81/ton and thereby augment the economic security of the Town.

It does not seem likely that the Town's interest in meeting its tonnage requirements to defendant Clarkstown Recycling Center, Inc., and in so doing avoid a penalty for each ton under the requisite annual minimum of 120,000 tons (*see*, Doc. No. 11, Ex. E, ¶ 4), can constitutionally justify the requirement that solid waste processors and carters expend the sum of $81/ton, rather than the $70/ton they paid prior to the enactment of Local Law No. 9, to process and cart the same without of Town solid waste to the same without of Town facilities. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (a state's interest in enhancing the reputation of local products did not justify the requirement that a company build a packing plant in that state). Nor can the Town shift or defray the cost of disposing of local solid waste for the benefit of local residents to out-of-state persons or interests by improperly restricting competition and overtly blocking the interstate transportation of solid waste generated out of Town.

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[2] This Court assumes, without deciding the issue, that the Town can regulate the disposal of garbage generated *within* the Town's territorial limits. In fact, plaintiffs do not dispute that Clarkstown may regulate solid waste generated within its borders or that which the Town contracts to dispose of for other municipalities. *See* Doc. 20, at 2.

Thus, this Court concludes that it is likely that plaintiffs can demonstrate that the Local Law constitutes an unreasonable, discriminatory and impermissible burden on interstate commerce in violation of the United States Constitution.

Since plaintiffs have established the requisite likelihood of success on the merits of the commerce clause claim, the Court turns its attention to the issue of irreparable injury. The essential element of irreparable harm has been defined to mean injury for which monetary award cannot be adequate compensation. Therefore, "it has always been true . . . that where money damages is adequate compensation a preliminary injunction will not issue." *Jackson Dairy Inc.*, 596 F.2d at 72. The importance to the movant of demonstrating clearly and convincingly exactly why money damages are inadequate cannot be overstated. *See, e.g., Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57-65 (1975).

Inasmuch as plaintiffs have demonstrated that Local Law No. 9 threatens to or actually deprives plaintiffs of their constitutional rights, privileges or immunities under the Commerce Clause, this deprivation unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976) (deprivation of constitutional right held to constitute irreparable injury). Moreover, absent the grant of a preliminary injunction, plaintiffs will be precluded from continuing the operation of their interstate disposal of solid waste generated without the territorial limits of the Town of Clarkstown. Because realistically it would not be possible to measure plaintiffs actual loss of customers and good will that will necessarily occur, the injury to plaintiffs would likely be irreparable.

In determining whether or not to grant a preliminary injunction, this Court has also given considerable weight to the public interest in the efficient, economical and environmental safe disposal of solid wastes. While Rule

65 does not expressly mention the public interest, our Court of Appeals has recognized that a district court "may go much further both to give or to withhold [injunctive] relief in furtherance of the public interest than where only private interests are involved." *Standard & Poor's Corporation, Inc. v. Commodity Exchange, Inc.*, 683 F.2d 704, 711 (2d Cir. 1982) (citations omitted).

Thus, in deciding to grant a preliminary injunction in the instant case, this Court recognizes, as did Chief Justice Rehnquist, in his dissenting opinion in *Philadelphia v. New Jersey*, 437 U.S. 617, 629-630 (1978), the national importance of the sanitary treatment and disposal of solid waste. If Local Law No. 9, in effect, increases the cost of shipping solid wastes through the Town of Clarkstown, and thereby limits the flow of interstate commerce, Clarkstown's health and environmental concerns may be served but the interest of the public will be compromised. Thus, this Court concludes that the need to protect the public from the extremely serious health and safety problems associated with solid waste disposal and the attendant costs of doing so provides a strong ground for the maintenance of a preliminary injunction.

A preliminary injunction is granted prohibiting the enforcement of Section 5(a) of Local Law No. 9 against plaintiffs except insofar as it concerns locally generated solid waste originating within the boundaries of the Town of Clarkstown.

Summary

The Court grants defendant's motion for summary judgment but only insofar as it relates to plaintiffs' antitrust claims. The motion is denied in all other respects. The Court at present declines to make the finding contemplated by Rule 54(b) of the Federal Rules of Civil Procedure.

Nothing in this opinion shall be construed to relate to the issue presently pending before the Appellate Division of the Supreme Court, on appeal from the Hon. Alfred Weiner, Acting Supreme Court Justice.

All counsel appearing in this action are directed to appear at Courtroom 31, United States Courthouse, 101 East Post Road, White Plains, New York on September 16, 1991 at 9:00 AM, for the purpose of a status report conference and to set a trial date.

Settle judgment, providing specific direction as to the bond posted pursuant to Rule 65(c), on waiver of notice of settlement or five (5) days notice of settlement.

SO ORDERED:

Dated: White Plains, New York
July 11, 1991

/s/ Charles L. Brieant
CHARLES L. BRIEANT
Chief Judge

APPENDIX E

[October 27, 1992]

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of October A.D. 1992.

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-10 Mo. No. 1047

THE TOWN OF CLARKSTOWN,
Respondent,

v.

C & A CARBONE, INC., *et al.*,
Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX F

TOWN OF CLARKSTOWN

Local Law No. 9 of the year 1990

A local law entitled, "SOLID WASTE TRANSPORTATION AND DISPOSAL."

Be it enacted by the TOWN BOARD of the Town of CLARKSTOWN as follows:

Section 1. Definitions

Unless otherwise stated expressly, the following words and expressions, where used in this chapter, shall have the meanings ascribed to them by this section:

ACCEPTABLE WASTE—All residential, commercial and industrial solid waste as defined in New York State Law, and Regulations, including Construction and Demolition Debris. Acceptable Waste shall not include Hazardous Waste, Pathological Waste or sludge.

CONSTRUCTION AND DEMOLITION DEBRIS—Uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of structures and roads; and uncontaminated solid waste consisting of vegetation resulting from land clearing and grubbing, utility line maintenance and seasonal and storm related cleanup. Such waste includes, but is not limited to, bricks, concrete and other masonry materials, soil, rock, wood, wall coverings, plaster, drywall, plumbing fixtures, non-asbestos insulation, roofing shingles, asphaltic pavement, electrical wiring and components containing no hazardous liquids, metals, brush grass clippings and leaves that are incidental to any of the above.

HAZARDOUS WASTE—All solid waste designated as such under the Environmental Conservation Law, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Resource Conservation and Recovery Act of 1976 or any other applicable law.

PATHOLOGICAL WASTE—Waste material which may be considered infectious or biohazardous, originating from hospitals, public or private medical clinics, departments or research laboratories, pharmaceutical industries, blood banks, forensic medical departments, mortuaries, veterinary facilities and other similar facilities and includes equipment, instruments, utensils, fomites, laboratory waste (including pathological specimens and fomites attendant thereto), surgical facilities, equipment, bedding and utensils (including pathological specimens and disposal fomites attendant thereto), sharps (hypodermic needles, syringes, etc.), dialysis unit waste, animal carcasses, offal and body parts, biological materials, (vaccines, medicines, etc.) and other similar materials, but does not include any such waste material which is determined by evidence satisfactory to the Town to have been rendered non-infectious and non-biohazardous.

PERSONS—Any individual, partnership, corporation, association, trust, business trust, joint venturer, governmental body or other entity, howsoever constituted.

UNACCEPTABLE WASTE—Hazardous Waste, Pathological Waste and sludge.

SLUDGE—Solid, semi-solid or liquid waste generated from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility.

TOWN—When used herein, refers to the Town of Clarkstown.

Section 2. General Provisions

A. Intent; Purpose.

I. The intent and purpose of this chapter is to provide for the transportation and disposition of all solid waste within or generated within the Town of Clarkstown so that all acceptable solid waste generated within the Town is delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York and such other sites, situate in the Town, as may be approved by the Town for recycling, processing or for other disposition or handling of acceptable solid waste.

II. The powers and duties enumerated in this law constitute proper town purposes intended to benefit the health, welfare and safety of Town residents. Additionally, it is hereby found that, in the exercise of control over the collection, transportation and disposal of solid waste, the Town is exercising essential and proper governmental functions.

B. Supervision and Regulation.

The Town Board hereby designates the Director of the Department of Environmental Control to be responsible for the supervision and regulation of the transportation and disposition of all acceptable waste generated within the Town of Clarkstown. The Director of the Department of Environmental Control shall be responsible for and shall supervise the Town's activities in connection with any waste collection and disposal agreements entered into between the Town

and third parties and shall report to the Town Board with respect thereto.

C. Power to Adopt Rules and Regulations.

The Town Board may, after a public hearing, adopt such rules and regulations as may be necessary to effectuate the purposes of this chapter. At least seven (7) business days' prior notice of such public hearing shall be published in the official newspaper of the Town. A copy of all rules and regulations promulgated hereunder and any amendments thereto shall be filed in the office of the Town Clerk upon adoption and shall be effective as provided therein.

Section 3. Collection and Disposal of Acceptable Waste.

A. The removal, transportation and/or disposal of acceptable waste within or generated within the Town of Clarkstown shall be exclusively disposed of, controlled and regulated by the Town under this chapter and Chapter 50 and Chapter 82 of the Clarkstown Town Code, together with such rules and regulations as the Town has or may from time to time adopt.

B. All acceptable waste, as defined herein, except for construction and demolition debris, shall be removed, transported and/or disposed of only by carters licensed pursuant to the requirements of Chapter 50 of the Clarkstown Town Code and any amendments thereto. All other persons are hereby prohibited from removing, transporting or disposing of aceptable waste, except for construction and demolition debris generated within the Town of Clarkstown, and except as may be provided for herein or in the rules and regulations adopted pursuant to this chapter and/or Chapter 50 of the Clarkstown Town Code.

C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid, or to sites outside the town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

Section 4. Disposal of Unacceptable Waste.

A. No unacceptable waste shall be delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York or other solid waste facility operated by the Town of Clarkstown or recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code by any person, including, without limitation, any licensed carter or any municipality. Failure to comply with the provisions of this section shall be subject to the provisions with respect to such penalties and enforcement, including the suspension or revocation of licenses and the imposition of fines, in accordance with the provisions of this chapter and/or Chapter 50 of the Clarkstown Town Code and any

amendments thereto. The Town Board of Clarkstown may, by resolution, provide for the disposal of sewer sludge, generated by a municipal sewer system or the Rockland County sewer district, at a disposal facility situate within the Town of Clarkstown.

B. It shall be unlawful, within the Town, to dispose of or attempt to dispose of unacceptable waste of any kind generated within the territorial limits of the Town of Clarkstown, except for sewer sludge as provided for in Section "A" above.

Section 5. Aceptable and Unacceptable Waste Generated Outside the Town of Clarkstown.

A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

B. It shall be unlawful for any person to import acceptable waste or unacceptable waste from outside the Town of Clarkstown and dump same on any property located within the Town of Clarkstown and to proceed to sift, sort, mulch or otherwise mix the said material with dirt, water, garbage, rubbish or other substance, having the effect of concealing the contents or origin of said mixture. This provision shall not apply to composting of acceptable waste carried out by the Town of Clarkstown.

Section 6. Fees for Disposal of Acceptable Waste at Town Operated Facilities.

There shall be separate fees established for disposal of acceptable waste at Town operated disposal facilities. The Town Board, by resolution adopted from time to time, shall fix the various fees to be collected at said facilities. The initial fees to be collected are those adopted by the Town Board on December 11, 1990 by Resolution Number 1097.

Section 7. Penalties for Offenses.

Notwithstanding any other provision of this chapter, the violation of any provision of this chapter shall be punishable by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment for a period not exceeding fifteen (15) days for each offense, or by both fine and imprisonment, and each day that such violation shall be permitted to continue shall constitute a separate offense hereunder.

Section 8. Repealer; Severability.

Ordinances and local laws or parts of ordinances or local laws heretofore enacted and inconsistent with any of the terms or provisions of this chapter are hereby repealed. In the event that any portion of this chapter shall be declared invalid by a court of competent jurisdiction, such invalidity shall not be deemed to affect the remaining portions hereof.

Section 9. When Effective.

This chapter shall take effect immediately upon filing in the office of the Secretary of State.

APPENDIX G

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

THE TOWN OF CLARKSTOWN,
Plaintiff,

-against-

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC.,
ANGELO CARBONE and "JOHN DOE 1-6",
Defendants.

FIRST AMENDED ANSWER TO
FIRST AMENDED COMPLAINT

[April 24, 1991]

Defendants, C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC., ANGELO CARBONE and "JOHN DOE 1-6", by their attorneys, GRANIK SILVERMAN SANDBERG CAMPBELL NOWICKI RESNIK, amending the Verified Answer to the First Amended Complaint, respectfully alleges:

• • • •

6. Local Law No. 9, in its effect and import, violates Article I, Section 8, Clause 3 of the Constitution of the United States, and, as such, Local Law No. 9 is illegal and invalid.

• • • •